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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,983	03/10/2004	Jerry V. Mayeux	30310-US-548	5003
5179	7590	07/13/2005	EXAMINER	
PEACOCK MYERS, P.C. P O BOX 26927 ALBUQUERQUE, NM 87125-6927			MCCORMICK EWOLDT, SUSAN BETH	
		ART UNIT	PAPER NUMBER	1655
DATE MAILED: 07/13/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/797,983	MAYEUX, JERRY V.	
	<b>Examiner</b>	<b>Art Unit</b>	
	S. B. McCormick-Ewoldt	1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 05 May 2005.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 7-37 and 83-92 is/are pending in the application.  
 4a) Of the above claim(s) 16, 17, 35, 36, 85, 86 and 88-92 is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 7-15, 18-34, 37, 83-84 and 87 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | Paper No(s)/Mail Date. _____ .  |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>September 22, 2004</u> . | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|   | 6) <input type="checkbox"/> Other: _____ .                                  |

**DETAILED ACTION**

*Status of Application*

The Art Unit location of your application in the PTO has changed. To aid in correlating any papers for this application, all further correspondence regarding this application should be directed to Group Art Unit 1655.

*Election/Restrictions*

Applicant's election of Group II and with traverse and the election of species, nitrogen and calcium, in the reply filed on May 5, 2005 is acknowledged. The traversal is on the ground(s) that claim 35 was erroneously included in the requirement for the election of species. This is not found persuasive because Applicant did not elect all three nutrients. Therefore, claims 16-17 and 35-36 are not elected and properly included in the election of species.

The requirement is still deemed proper and is therefore made FINAL.

Claims 16-17, 35-36, 85-86 and 88-92 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made with traverse in the reply filed on May 5, 2005.

*Claims Pending*

Applicant has cancelled claims 1-6 and 38-82 and added claims 83-92. Claims 7-15, 18-34, 37, 83-84 and 87 will be examined on the merits solely in regards to the elected species.

*Double Patenting*

Applicant is advised that should claim 11 be found allowable, claim 12 will be objected to under 37 CFR 1.75 as being a substantial duplicate thereof. When two claims in an application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is proper after allowing one claim to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k).

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 7 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Tien-Lai (GB 2 191 929 A).

Tien-Lai (GB 2 191 929 A) disclose using yeast, *Capsicum*, water and a nutrient mixture wherein the nutrient mixture can include sugar, salt or flour which are enough nutrients to ferment yeast (whole document). Thus, the ingredients used by Tien-Lai meet the limitations of claim 7 as the composition comprises yeast, *Capsicum*, water and a nutrient mixture and thus anticipates the claimed invention.

Claims 7 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by JP-08099813 A- English translation provided).

JP-08099813 disclose using capsaicin and fermenting wild yeast in a composition to be used as plant growth regulators. The nutrient mixture can comprise of saccharide or starch as disclosed by JP-08099813 ([0005]). Thus, the ingredients used by JP-08099813 meet the limitations of claim 7 as the composition comprises capsaicin (*Capsicum*), yeast, water and a nutrient mixture and thus anticipates the claimed invention.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

- (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1655

Claims 7-15, 18-34, 37 and 83-84 and 87 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tien-Lai (GB 2 191 929 A), Flenø *et al.* (US 5,972,642) and Todd (US 6,074,687).

Tien-Lai (GB 2 191 929 A) discloses using capsicum sauce, yeast, sugar, water, chili powder and chili oil which is fermented together to make a bread (whole document). Tien-Lai does not teach using nitrogen and calcium mixture.

Flenø *et al.* (US 5,972,642) disclose a fermented yeast culture comprising carbohydrate, nitrogen, and micronutrients such as calcium, in a food or feed for animals (column 1, lines 17-20; column 10, lines 44-48; column 11, lines 30-31, 38-45; column 16, lines 49-52).

Thus, it was known in the art at the time of the invention that it is routine to add ingredients such as nitrogen and calcium to a medium that is fermented by yeast. A person of ordinary skill in the art would therefore expect that adding nitrogen and calcium to the composition of Tien-Lai would be useful in creating an environment suitable for yeast fermentation. Based on this reasonable expectation, a person of ordinary skill in the art would have been motivated to add calcium and nitrogen to the composition taught by Tien-Lai.

Taken together, Tien-Lai and Flenø teach a composition comprising yeast, capsicum, sugar, water, chili powder, chili oil, nitrogen and calcium. However, the references do not teach using *Capsicum chinensis* in the composition. Todd teaches that *Capsicum chinensis* is commonly used in food and beverages to improve the flavor of the food product (column 1, lines 36-39 and column 6, line 17). Thus, a person of ordinary skill in the art would reasonably expect that *Capsicum chinensis* could be added to the food composition taught by Tien-Lai and Flenø to further improve the flavor of the composition. Based on this reasonable expectation of success, a person of ordinary skill in the art would be motivated to modify Tien-Lai and Flenø in such a manner.

The references also do not specifically teach the ingredients in the amounts claimed by Applicant. The amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient in order to best achieve the desired results. Thus, absent some

Art Unit: 1655

demonstration of unexpected results from the claimed parameters, this optimization of ingredient amount would have been obvious at the time of Applicant's invention.

It would clearly have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine an effective amount fermented yeast and nutrients and micronutrients, based upon the beneficial teachings provided by the cited references, as discussed above. The adjustment of particular conventional working conditions is deemed merely a matter of judicious selection and routine optimization, which is well within the purview of the skilled artisan.

Claim 7-15, 19-34, 84 and 87 are rejected under 35 U.S.C. 103(a) as being unpatentable over JP-08099813 A- English translation provided) in view of Flenø *et al.* (US 5,972,642).

JP-08099813 disclose using capsaicin and fermenting wild yeast in a composition to be used as plant growth regulators. JP-08099813 does not disclose using a nutrient medium. However, saccharide or starch can be used as a nutrient medium ([0005]).

Flenø *et al.* (US 5,972,642) disclose a fermented yeast culture comprising carbohydrate, nitrogen, and micronutrients such as calcium, in a food or feed for animals (column 1, lines 17-20; column 10, lines 44-48; column 11, lines 30-31, 38-45; column 16, lines 49-52).

Thus, it was known in the art at the time of the invention that it is routine to add ingredients such as nitrogen and calcium to a medium that is fermented by yeast. A person of ordinary skill in the art would therefore expect that adding nitrogen and calcium to the composition of JP-08099813 would be useful in creating an environment suitable for yeast fermentation. Based on this reasonable expectation, a person of ordinary skill in the art would have been motivated to add calcium and nitrogen to the composition taught by JP-08099813.

The references also do not specifically teach the ingredients in the amounts claimed by Applicant. The amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient in order to best achieve the desired results. Thus, absent some

demonstration of unexpected results from the claimed parameters, this optimization of ingredient amount would have been obvious at the time of Applicant's invention.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Summary

No claim is allowed.

Correspondence

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Susan B. McCormick-Ewoldt whose telephone number is (571) 272-0981. The Examiner can normally be reached Monday through Thursday from 6:00 a.m. to 4:30 p.m.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Bruce Campell, can be reached on (571) 272-0974. The official fax number for the group is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

sbme

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